IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 673

MARTHA CARDONA,

Appellant,

—against—

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, Members of and constituting the Board of Elections of the City of New York,

Appellees,

—and—

LOUIS J. LEFKOWITZ, as Attorney General,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF NATHAN STRAUS, IN SUPPORT OF APPELLANT, AND BRIEF OF *AMICUS CURIAE*

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May It Please the Court:

The undersigned, as counsel for Nathan Straus, respectfully moves this Honorable Court, for leave to file the accompanying brief, *amicus curiae,* in support of the appellant herein.

Counsel for appellant has consented to the filing of this brief. We have been unable to ascertain whether counsel for appellees or for the intervenor-appellee will so consent.

The following special reasons are set forth in support of this motion:

1. The movant is a candidate for the Democratic nomination for the House of Representatives in the 22nd Congressional District of the State of New York, which is located in the southeast portion of the County and Borough of the Bronx in the City of New York. It is believed that more than thirty per cent of the eligible voters in both the Democratic Primary, to be held at the end of June of 1966, and in the Congressional election, which will be held in November of 1966, are American-born citizens of Puerto Rican birth. Many of such persons are literate in their native Spanish, but are not literate in English.

As such candidate, the movant has a direct interest in the constitutionality of Article 2, Section 1, of the New York State Constitution and of Sections 150, 168, and 201 of the Election Law of the State of New York, since these provisions prevent native-born citizens of the United States, who are literate in Spanish but not in English, from voting for the movant as a candidate for the Congress of the United States.

2. The able brief submitted on behalf of appellant fails to set forth a number of arguments, which it is respectfully submitted demonstrate that the aforesaid provisions of the New York State Constitution and of the Election Law of the State of New York infringe appellant's rights under the Constitution of the United States. These additional reasons are set forth in the brief submitted herewith.

3. Thus, appellant fails to contend that the above cited provisions of the Constitution and the Election Law of New York have been rendered unenforcible by the enactment of Section 4(e) of the Voting Rights Act of August

6, 1965, 79 Stat. 437, 439, insofar as said Federal statute prohibits the States from denying the right to vote to citizens educated in Puerto Rico who are literate in Spanish, because of their inability to read and write English. This conclusion, it is respectfully submitted, is dictated by the Supremacy Clause of the United States Constitution, Article VI, Section II. [Indeed, appellant contends (and movant respectfully submits erroneously) that the Voting Rights Act of August 6, 1965 is not, by itself, determinative of the issue presented in this case (pg. 26 of appellant's principal brief).]

4. Appellant further fails to contend that, insofar as Congressional elections are concerned, Section 4(e) of the Voting Rights Act of 1965 is a valid exercise of power conferred upon Congress by Sections II and V of Article I and by the Seventeenth Amendment to the United States Constitution, which render the English literacy provisions of the New York State Constitution and Election Law unenforcible.

It is therefore respectfully requested that the motion for leave to file this brief *amicus curiae* be granted.

Dated: New York, N. Y., April 7, 1966.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF NATHAN STRAUS, IN SUPPORT OF APPELLANT

Preliminary Statement

Appellant is a native-born citizen of Puerto Rico, at her birth and now a part of the United States, whose common language is Spanish. She was educated in, and is literate, only in Spanish. The New York City Board of Elections has rejected appellant's demand that she be enrolled as

a voter, solely because of the provisions of Article II, Sec. 1 of the New York Constitution (and the provisions of Sections 150, 168 and 201 of the Election Law, which purportedly carry out the cited provision of the Constitution) which provide, among other things, that no person shall be eligible to vote unless able "to write and read English."

It is contended that the above cited provisions of the Constitution and Election Law of the State of New York deprive appellant of rights guaranteed to her under the Fourteenth Amendment to the United States Constitution.

Section 4(e) of the Voting Rights Act of 1965 prohibits the States from conditioning the balloting rights of persons educated in American-flag schools, in which the predominant classroom language was other than English, upon literacy in English. It is contended that this Statute is a constitutional exercise of Congressional power under the Fourteenth Amendment and, in the case of Congressional elections, under Sections II(1) and V(1) of Article I and the Seventeenth Amendment, which, under the Supremacy Clause of Article VI negates the contrary provisions of the New York State Constitution and laws.

ARGUMENT

POINT I

The literacy in English provisions of the New York State Constitution and Election Law violate the Fourteenth Amendment to the United States Constitution and have been rendered unenforceable, under the "Supremacy Clause", by the enactment of Section 4(e) of the Voting Rights Act of August 6, 1965.

Article 2, Section 1 of the New York State Constitution and Sections 150, 168 and 201 of the New York State Election Law (quoted in the Appendix to Appellant's Brief) contain the general requirement that a citizen be literate in English, in order to qualify as a voter in the State of New York.

The keystone of the present appellant's position, and of the dissenting opinion by three judges of the New York Court of Appeals, is that the denial of voting rights, under the above listed provisions of the New York State Constitution and Election Law, to a native-born American citizen, who is literate in Spanish, but not in English, is unconstitutionally discriminatory. Puerto Rican born United States citizens have been held by this court to be entitled to "exact equality with citizens from the American homeland", *Balzac* v. *Commonwealth of Puerto Rico,* 258 U. S. 298, 311 (1921). Accordingly, the application of the New York Constitution and Law to deny voting rights to Puerto Rican born citizens who are fully literate, but only in Spanish, excludes those citizens from the suffrage, in derogation of "the equal protection of the laws" which they are guaranteed by the Fourteenth Amendment to the United States Constitution.

The present movant agrees with appellant's contention that the Fourteenth Amendment, of and by itself, renders illegal the New York State voting qualification rules, as applied to citizens who, though literate in their native language, cannot read and write English.

It seems to us, however, the clearest reason why the above cited provisions of the New York State Constitution and Election Law may not be enforced is their flat inconsistency with Section 4(e) of the Voting Rights Act of August 6, 1965, P. L. 89-110, 79 Stat. 437, 439, which reads, in part, as follows:

> "(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English Language."

Absent contrary and constitutional Federal legislation, the several States may, of course, condition the right to vote upon reasonable literacy requirements, if such tests are not designed or utilized so as to discriminate against a class. *Lassiter* v. *Northampton Education Board,* 360 U. S. 45. However, recent decisions of this court make it clear that the States are prohibited from drawing lines of eligibility for the franchise "which are inconsistent with the Equal Protection clause of the Fourteenth Amendment". *Harper et al.* v. *Virginia State Board of Elections et al.* —— U. S. —— (decided March 24, 1966.) See also *Louisiana* v. *U. S.,* 380 U. S. 145; *Carrington* v. *Rash,* 380 U. S. 89; *Gray* v. *Sanders,* 372 U. S. 368, 380.

Almost a century ago, this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370, described "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Accordingly, and in the absence of congressional action, legislation or action by the States in an alleged infringement of the right of citizens to vote has always been subject to meticulous judicial scrutiny. *Reynolds* v. *Sims*, 377 U. S. 533, 561-2.

The Federal and State governments have concurrent jurisdiction to control exercise of the suffrage in the several States, subject to the first Section of the XIVth Amendment and, in the case of congressional elections, to Article I, Sections II and V, and to the XVIIth Amendment. It is elementary, however, that legislation properly adopted by Congress fixing or prohibiting state imposition of restrictions on eligibility to vote binds "the judges in every State . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U. S. Cons., Art. VI, Sec. II.

This Court has repeatedly held that the plain meaning of the Supremacy Clause is that conflicting State law and policy must yield to contrary Federal statute and policy, in any area of concurrent jurisdiction. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Francis* v. *Southern Pacific Co.*, 333 U. S. 445; *Testa* v. *Katt*, 330 U. S. 386, 391; *Hill* v. *Fla.*, 325 U. S. 538.

These principles have expressly been applied to State control of suffrage. As this court recently stated, the states may not create standards for exercise of the right to vote which "contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton Education Board, supra*, at page 51.

The Fifth Section of the Fourteenth Amendment gives Congress the affirmative "power to enforce, by appropriate legislation the provisions of" the Amendment. In a decision speaking of the substantially similar enforcement sections of the XIIIth, XIVth and XVth Amendments and given particular authority because rendered shortly after their enactment, this Court stated:

> "All of the amendments derive much of their force from [the enforcement sections]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation." *Ex parte Virginia,* 100 U. S. 337, at 345-6.

This court has consistently recognized that the "guidance of Congress" was a key factor in determining the application of the "due process," "equal protection" and "privileges or immunities" clauses of the Fourteenth Amendment. *Fay* v. *New York,* 332 U. S. 261 at 283-4. See also *Alabama* v. *U. S.,* 373 U. S. 545; *Strauder* v. *West Virgina,* 100 U. S. 303; *Ex parte Virginia, supra.*

We respectfully submit that under the Fifth Section of the Fourteenth Amendment Congress has the power to prevent the states from depriving literate citizens of the United States, educated in Spanish in Puerto Rico, from being deprived of the right to vote, merely because they are unable to read and write in English. The provisions of Section 4(e) of the Voting Rights Act of August 6, 1965 which stripped the states of such power, is an appropriate Congressional implementation of this court's holding that Puerto Rican-born United States citizens are entitled to "exact equality with citizens from the American homeland", *Balzac* v. *Commonwealth of Puerto Rico, supra.*

POINT II

As applied to Congressional elections, including nominating primaries, the literacy in English provisions of the New York State Constitution and Election Law also violate Article I, Sections II and V, and the XVIIth Amendment to the United States Constitution.

The general provisions of Article 2, Section 1 of the New York State Constitution and of Sections 150, 168 and 201 of the New York State Election Law that a citizen must be literate in English, in order to qualify as a voter, are applied by appellees, the New York City Board of Elections, in the election of members of the United States House of Representatives and Senate, to represent New York. They are also applied in the primaries which designate the candidates of the various parties for such congressional office.

This result stems from a literal reading of the identical language of Article I, Section II, and of Section I of the XVIIth Amendment which provide that, in the respective election of Senators and Representatives: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

For the reasons set forth in Point I of this brief and in the Appellant's brief, it is respectfully contended that the literacy in English provisions of New York law are unconstitutional, in any event, and have been rendered nugatory by the contrary mandate contained in Section 4(e) of the Voting Rights Act of August 6, 1965. However, if this court should invalidate Section 4(e), as applied to State and local balloting, it seems clear that the literacy

in English provisions cannot be applied to Congressional elections and nominating primaries.

Nothing in the United States Constitution guarantees or creates the right to vote in State or local elections or even in a Presidential election. In these areas the Constitution merely prohibits restrictions on the suffrage, "on account of race, color or previous condition of servitude," "on account of sex", and such other limitations as deprive citizens of "the equal protection of the laws." (XVth, XIXth and XIVth Amendments.)

However, the right to vote for Representatives and Senators comes "not from the States, but from the Constitution, and so is a 'privilege and immunity' of national citizenship, about the exercise of which Congress may throw the protection of its legislation and which, under Section I of the Fourteenth Amendment, no State may 'abridge.'"[1] See *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Saylor,* 322 U. S. 385; *Wiley* v. *Sinkler,* 179 U. S. 62.

Similarly the right to vote in a primary election for the nomination of Congressional candidates is established and guaranteed by the Constitution of the United States. *U. S.* v. *Classic,* 313 U. S. 299; *Smith* v. *Allwright,* 321 U. S. 649.

Under Article I, Section V of the Constitution, "Each House shall be the judge of the election . . . of its own members . . .". The power conferred by this sentence has been broadly construed, since the founding of this Republic, so as, among other things, to be virtually immune from judicial review. *Barry* v. *United States,* 279 U. S. 597; *Keogh* v. *Horner,* 8 F. Supp. 933 (D. C. Ill.); *Daniel-*

[1] Corwin, *The Constitution and What It Means Today* (1963 Ed.), p. 6.

son v. *Fitzsimmons*, 44 N. W. 2d 484, 232 Minn. 149. As a coordinate branch of the Federal government, given equal responsibility with the courts under Section V of the XIVth Amendment, for ensuring "equal protection of the laws" to all citizens, Congress, at the very least, has the power to prohibit the creation of State restrictions upon voting for members of the House and Senate. Cf. *Ex parte Virginia, supra; Shub* v. *Simpson*, 76 A. 2d 332, 196 Md. 177.

By Article 4(e) of the 1965 Voting Rights Act, Congress has declared that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting by an English literacy test. This Congressional determination is a reasonable exercise of the powers conferred by the Constitution, read as a whole, upon the legislative branch of the Federal Government, contravenes the contrary provisions of the New York Constitution or law and is not subject to judicial review. Cf. *Luther* v. *Borden*, 7 How. (U. S.) 1; *Coleman* v. *Miller*, 307 U. S. 433; *Legal Tender Cases*, 12 Wall. (U. S.) 457.

POINT III

Section 4(e) of the Voting Rights Act of 1965 is a valid implementation of international agreements made by the United States, which under the Supremacy Clause invalidates any contrary provisions of the New York State Constitution or laws.

In 1945, with the concurrence of the Senate, President Truman ratified the Charter of the United Nations, as a Treaty. Article 55 of the Charter (59 Stat. 1045-6) provides in part that the subscribing nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, *language,* or religion". [Emphasis supplied.] Article 56 of the Charter (*id.*, at 1046), binds the signatory nations to take action "in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In order to secure exemption from United Nations control over Puerto Rico as "colonial territory" of the United States, pursuant to Article 73(e) of the United Nations Charter, President Eisenhower assured the General Assembly that, among other things: "The People of Puerto Rico will participate effectively in their government through universal, secret and equal suffrage". (*U. S. Participation in the United Nations,* Report by the President to the Congress for the year 1953, pp. 181 *et seq.;* 28 Dept. State Bulletin 587.)

As a Treaty made under the authority of the United States, the United Nations Charter is, pursuant to Article VI, Section II, "the supreme law of the land" and negates "anything in the Constitution or laws of any State to the contrary notwithstanding". *Bacardi Corporation of*

America v. *Domenech*, 311 U. S. 150; *Ware* v. *Hylton*, 3 Dall. (U. S.) 171; *Santovincenzo* v. *Egan*, 284 U. S. 30.

As an Executive Agreement, the commitment made to the United Nations by the President in 1953, with respect to the voting rights of Puerto Ricans, is an international compact, which, like a treaty, is the supreme law of the land, under Article VI, Section II of the U. S. Constitution. *United States* v. *Pink*, 315 U. S. 203; *United States* v. *Belmont*, 301 U. S. 324.[1]

The provisions of Section 4(e) of the Voting Rights Act of 1965 are an appropriate method, by which Congress implemented this government's prior international commitment to the effect that English, as a dominant language, would not be impressed upon citizens, born or educated in Puerto Rico, as a condition to their exercise of the suffrage. Such law was "necessary and proper," in the conclusive judgment of Congress, to carry out the obligations assumed by the United States pursuant to the United Nations Charter. For this reason alone, the literacy in English provisions of the New York State Constitution and Election Law are unenforceable. *Missouri* v. *Holland*, 252 U. S. 416; *United States* v. *Fox*, 94 U. S. 315; *Todok* v. *Union State Bank of Harvard*, 281 U. S. 449.

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[1] See also McDougal & Lans, "Treaties and Congressional-Executive or Presidential Agreements" (1945), 54 *Yale L.J.* 181, 308, 314-6.

CONCLUSION

WHEREFORE, for the reasons set forth in appellant's brief and this brief, the order appealed from should be reversed, and appellees, New York City Board of Elections, directed to enroll appellant as a duly qualified voter.

Respectfully submitted,

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April 7, 1966